No. 04-1451

Supreme Court, U.S.
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In The

Supreme Court of the United States

CURTIS KINNARD,

Petitioner,

vs.

THE RUTHERFORD COUNTY BOARD OF EDUCATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 the Rutherford County Board of Education is a governmental body and therefore generally not subject to the disclosure requirements of Rule 29.6. However, as a result of various error and omissions and general liability insurance policies in effect, the Rutherford County Board of Education makes the following disclosure. The Rutherford County Board of Education has insurance which, in addition to paying fees and expenses of counsel, may provide coverage in whole or in part for an adverse judgment. Insurance is provided to the Rutherford County Board of Education by one of the various insuring entity companies commonly known as "The Hartford" which is a wholly owned subsidiary of the Hartford Financial Services Group, Inc. and which is publicly on the NYSE under the symbol HIG.

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CORRECTED STATEMENT OF THE CASE

The opinion of the Court of Appeals correctly sets forth the underlying factual timetable. *Kinnard v. Rutherford County Bd. of Educ.*, 109 Fed.Appx. 85, 2004 WL 1987303 (6th Cir. 2004). In relevant part and to correct a potential misconception in the Petitioner's statement of the case, the Respondent provides the following statement.

Petitioner was hired as a special education teacher at Smyrna High School for the 1993-94 school year and retained for the 1994-95 school year upon the recommendation of Robert Raikes, the Principal of Smyrna High School. 2004 WL 1987303 at *1.

Following the 1994-95 school year, Raikes recommended that Kinnard not be retained for the 1995-96 school year based upon what he believed were performance related problems. *Id.* at *2.

On September 21, 1995, Kinnard appeared at a meeting of the Board of Education, where he complained about the discriminatory treatment he had received. A week later, in September 1995, Kinnard was hired as a social studies teacher at Smyrna Middle School to fill an interim position, and was instructed that the position was non-renewable. *Id.*

Donald Jernigan ("Jernigan"), the principal of Smyrna Middle School, hired Kinnard despite his negative reference from Smyrna High School because the position was for a limited time (the school year) and the position was not special education. At the time of his hire, Kinnard had already filed a charge of discrimination (against the defendant), and the Board of Education was aware of the EEOC charge which Kinnard had filed against it. *Id.*

Kinnard was evaluated by Jernigan, who noted a number of deficiencies. Jernigan was not called upon to make the decision to recommend Kinnard for rehire, but has stated that he would have recommended against rehire. Moreover, based upon Kinnard's evaluation scores at Smyrna Middle School, which were below the minimum competencies for a teacher with his experience, he could not have been retained. Kinnard never filed a charge of discrimination regarding his employment at Smyrna Middle School. On December 8, 1997, Kinnard filed a second charge of discrimination, alleging that he was not hired for the 1996-97 school year in retaliation for asserting his rights under Title VII. *Id.*

REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

A. The Exclusion of the Ogleton and Brown Testimony.

As an initial matter, the Petitioner completely misstates his first and second issue by implicitly indicating to the Court that the evidence proffered by Ogleton and Brown was in fact evidence of a pattern and practice of discrimination. As correctly noted by the Court of Appeals, Ogleton was going to testify about having discussed with the School Superintendents the racial imbalance between educators in the Rutherford County School System and the student population. 2004 WL 1987303 at *3. Brown's proposed testimony related the same information but was confined to Smyrna High School as opposed to the entire system. *Id.* at *4.

The trial court excluded the testimony as being irrelevant. The Petitioner's attempt to offer some statistical evidence in an effort to influence the Court that simply because a racial imbalance exists he must have been discriminated against. However, the Petitioner did not plead a case of disparate impact but rather disparate treatment. Even assuming he was traveling under the disparate impact theory, the testimony was properly excluded. To establish a *prima facie* case of disparate impact, a plaintiff must: (1) identify a specific employment practice; (2) identify a racial imbalance in the workforce; and (3) show that the specific employment practice is responsible for the statistical disparities. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 984-88 (1988). Statistical evidence alone is simply irrelevant and is akin to testimony that someone was injured without an explanation as to why or how they were injured.

The Petitioner never offered proof as to a specific employment practice. To the contrary, he based his "statistical analysis" not on the applicant pool but upon the teacher-student ratios. Kinnard offered no proof of the comparisons of minority applicants to minority employment.

To support such a claim, Kinnard must present evidence that, during the relevant period, a disproportionate number of minority candidates or applicants were not employed. *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906, 911, 923-24 (7th Cir. 1991) (racial imbalance established by statistics indicating that African-American union members received fewer job referrals than they should relative to their population in the referral hall; for example, in 1984, African-American members

received only 14% of the referrals even though 30-50% of the members present at the hall were African-American).

As this Court has explained: "a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655-56, 109 S. Ct. 2115, 2124, 104 L. Ed. 2d 733 (1989).

Employers possess no affirmative duty to correct workforce imbalances not attributable to their own conduct. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 993 (1988) (finding that employers have no duty under Title VII to ameliorate uncaused workforce imbalances because such a legal rule is "'far from the intent of Title VII'") quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (finding that employers are under no affirmative duty to impose hiring quotas to reflect demographic percentages).

Finally, when special qualifications, e.g., a teaching license and various other certifications or certain levels of education are required for the applicant, the use of certain statistics such as general student population do not provide probative evidence of cause and effect. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977) (must compare percentage of blacks in employer's work ranks with percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions).

As this Court has held, trial court's have significant discretion in determining what evidence to admit and such

determinations will not be overturned absent an abuse of discretion. *United States v. Abel*, 469 U.S. 45, 54-55 (1984).

B. Petitioner's Retaliation Claim

In bringing a retaliation claim, the first step for a plaintiff is to establish a *prima facie* case of discrimination. The burden of proof to establish a prima facie case lies exclusively with the plaintiff. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 502-03, 508-10 n.3 (1993). A plaintiff can establish a prima facie case by direct or indirect evidence. In the absence of direct evidence of discrimination, a plaintiff may meet the burden by demonstrating inferentially that they were a victim of intentional discrimination. See *McDonnell Douglas*, 411 U.S. at 802; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

The Petitioner's evaluations following his interim position at Smyrna Middle School were so poor that they failed to meet the minimum competencies required of a person with his teaching experience. Job performance, employee qualifications, etc., are widely recognized as valid, non-discriminatory reasons for adverse employment decisions. See generally, *Burdine*, 450 U.S. 248, 258-59 (1981). The evaluations were clearly an appropriate indicator of whether he was qualified for a position and thus he failed to establish a *prima facie* case or retaliation. Even assuming, *arguendo*, that he had established a prima facie case, Petitioner never introduced any evidence to establish that the Board of Education's decision to not rehire him for years subsequent to his employment at Smyrna Middle School were based upon anything other

than his evaluations. Accordingly, he failed to establish pretext under the shifting burden or production. An employer seeking to rebut a prima facie case of employment discrimination, violative of Title VII, need only "articulate" a legitimate non-discriminatory reason for its actions. *Burdine*, 450 U.S. 248, 254-55 (1981).

CONCLUSION

The Petitioner claims that the Sixth Circuit sanctioned a departure by the lower court from the usual course or judicial proceedings. See, Petition for Writ of Certiorari at 8. As shown above, no such departure has occurred. The decisions of both lower courts were in complete conformity with the decisions of this Court governing the admission of evidence and the burdens of production in employment discrimination cases. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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